

# TRANSCRIPT OF PROCEEDINGS

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of:

ARKANSAS CABLE  
TELECOMMUNICATIONS ASSOCIATION  
V.  
ENTERGY ARKANSAS, INC.

EB Docket No. 06-53

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DATE OF HEARING: APRIL 20, 2006 VOLUME: 1

PLACE OF HEARING: WASHINGTON, D.C. PAGES: 1-40

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## FEDERAL COMMUNICATIONS COMMISSION

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## PRE-HEARING CONFERENCE

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IN THE MATTER OF:

ARKANSAS CABLE TELECOMMUNICATIONS  
ASSOCIATION; COMCAST OF ARKANSAS, INC;  
BUFORD COMMUNICATIONS I, L.P. d/b/a  
ALLIANCE COMMUNICATIONS NETWORK;  
WEHCO VIDEO INC.; AND  
TCA CABLE PARTNERS )  
d/b/a COX COMMUNICATIONS

Complainants,

v.

ENTERGY ARKANSAS, INC.,

Respondent.

EB Docket No.  
06-53

Thursday,  
April 20, 2006

Washington, D.C. 20554

The above-entitled matter came on for hearing at  
9:30 a.m.

BEFORE: ARTHUR I. STEINBERG  
Administrative Law Judge

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APPEARANCES:On behalf of the Federal Communications Commission:

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## I-N-D-E-X

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Start Time: 9:30 a.m.

End Time: 10:18 a.m.

P-R-O-C-E-E-D-I-N-G-S

9:30 a.m.

ADMIN. JUDGE STEINBERG: We are on the record now. This is a pre-hearing conference in EB Docket Number 06-53, by hearing Designation Order DA 05-2015, released March 2, 2006. The Chief Enforcement Bureau acting pursuant to delegated authority designated this case for hearing.

The issues generally relate to the engineering standards of Entergy Arkansas Incorporated. Entergy's charges to the complainants. The complainants allegedly unauthorized attachments to Entergy's poles. The responsibility for correcting allegedly non-compliant pole conditions, pole access, allegations of discrimination, and let me point out for the record, it's not racial discrimination, and whether any relief is appropriate, and the nature and scope of any such relief.

By order FCC 06M-01, released March 9, 2006, the Chief Administrative Law Judge appointed me to preside over this proceeding and scheduled a pre-hearing conference of this morning.

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1           Before I take the appearances, I'd like to  
2           inform the parties that I reviewed the draft of the  
3           hearing Designation Order before it was adopted. My  
4           review was limited to the language and structure of  
5           the proposed issues. And to some procedural matters.  
6           I did not review or make any suggestions concerning  
7           any of the substantive matters discussed in paragraphs  
8           1-17 of the Designation Order. In reviewing the  
9           draft, my primary concern was whether the proposed  
10          issues were framed in the appropriate, what we call  
11          issue language. And whether the draft HDO treated  
12          certain procedural matters the way they are usually  
13          treated in hearing designation orders.

14                 With regard to the issues, I suggested  
15                 some stylistic and structural modifications. With  
16                 respect to the procedural matters, my suggestions  
17                 related to the treatment of the burdens of proceeding  
18                 and proof. Of course, the Enforcement Bureau is free  
19                 to take or not take any of my suggestions.

20                 I want to make it very clear that neither  
21                 my review nor my suggestions constituted any pre-  
22                 judgment of the merits or ultimate outcome of this



1 proceeding.

2 Any questions about that?

3 (No response.)

4 Let me now take the appearances for the  
5 parties. And I'll just call the complainants the  
6 complainants. I don't have to go through each  
7 individual complainant, do I? So let me have the  
8 appearances for the complainants, please.

9 MR. THOMAS: Dave Thomas from Hogan and  
10 Hartson, your honor.

11 MS. SAPIR: Genevieve Sapir from Hogan and  
12 Hartson.

13 MR. WERNER: Paul Werner from Hogan and  
14 Hartson.

15 ADMIN. JUDGE STEINBERG: Okay. For the  
16 Entergy Arkansas Inc.

17 MR. RATHER: Gordon Rather from Wright,  
18 Lindsey and Jennings of Little Rock, Arkansas.

19 MR. DARLING: Web Darling, Entergy  
20 Services Inc.

21 MS. FUJIMOTO: Shirley Fujimoto, McDermott  
22 Will and Emery.

1 MR. RINES: David Rines, McDermott Will  
2 and Emery.

3 MS. HONEYSUCKLE: Janan Honeysuckle,  
4 Entergy Services Inc.

5 ADMIN. JUDGE STEINBERG: And for the Chief  
6 of Enforcement Bureau.

7 MR. ENGEL: Michael Engel from the  
8 Enforcement Bureau.

9 MS. SAKS: Lisa Saks from the Enforcement  
10 Bureau.

11 ADMIN. JUDGE STEINBERG: Thank you. You  
12 don't have to stand up.

13 MR. ENGEL: Thank you, your honor.

14 ADMIN. JUDGE STEINBERG: I do appreciate  
15 the courtesy. But you don't have to do that. We'd  
16 have people standing up, it would be like a Jack in a  
17 Box here. Okay.

18 By order by the pre-hearing conference  
19 released March 13, 2006, I asked the parties to confer  
20 for the purpose of developing a discovery plan and a  
21 proposed procedural schedule to govern this  
22 proceeding. And I'm happy to say that they did so and

1 they filed a joint report summarizing their proposals.  
2 I'm going to adopt most of the suggestions in the  
3 report. And I'll outline the procedural schedule for  
4 you. For the record, I handed out a draft of the  
5 procedural schedule before we started.

6 What I did, is I basically took the  
7 hearing date proposed by the complainants because I  
8 think a year and four months of discovery is plenty,  
9 is plenty of time to get ready for the hearing. If  
10 it's not, I'm sure somebody will let me know at the  
11 appropriate time. And we can, we can do something  
12 about it later.

13 But my general attitude is, I am flexible  
14 in terms of the internal dates but I am usually not  
15 very flexible when it comes to the final hearing date.  
16 Unless somebody can show me an awfully good reason why  
17 it's impossible to meet that date. But as far as the  
18 internal dates go, essentially whatever you all agree  
19 to, is going to be fine with me, most of the time.

20 I did fiddle with some of the dates. For  
21 instance, the admission session was, it was suggested  
22 that the admission session be held like a week after

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1 exhibit exchange. And I pushed it off because I  
2 suspect there are going to be thousands and thousands  
3 of pages of exhibits. And I just don't think, and  
4 it's going to be the first time I am going to see any  
5 of them, and I don't think I can possibly be prepared  
6 to preside in an admission session after only a week.

7 And it might, it might be necessary to  
8 push it off even further if I get really bogged down  
9 in looking at the exhibits. But you all can do  
10 something about that by keeping the exhibits to a  
11 minimum. And you know, I suspect that there is a  
12 little bit of humor in that sentence too.

13 The other thing was the, the Post  
14 Discovery Settlement Conference. The way your  
15 suggested dates worked out, the settlement conference  
16 would have been held like the day before the last date  
17 for completion of the expert witness depositions. I  
18 didn't think it made any sense to have the settlement  
19 conference until all of the discovery was over. So,  
20 it's just a couple of days here and there.

21 I think everything else in there is pretty  
22 much the way you suggested. Unless I miscalculated a

1 date. And I don't think I did because I checked it  
2 several times. And if I did, again, I am sure  
3 somebody will let me know.

4 I have a point of clarification. If you  
5 look at Footnote 1 of the proposed procedural  
6 schedule. And let me just read that into the record.  
7 "The initial and any subsequent sets of  
8 interrogatories, requests for production documents and  
9 requests for admissions shall be limited to no more  
10 than an overall total of fifty each. And may be  
11 directed by each party to each party named in the  
12 caption of this proceeding." And the next sentence  
13 basically says, "Every subpart is considered a  
14 separate interrogatory and request for production  
15 etc."

16 What I want to know is, is the fifty  
17 total, in other words, if somebody files thirty-five  
18 interrogatories, then they are limited to fifteen  
19 requests for production and requests for admissions?  
20 Is that correct?

21 MR. RATHER: No your honor.

22 ADMIN. JUDGE STEINBERG: So it's fifty

1 each?

2 MR. RATHER: Yes, your honor.

3 ADMIN. JUDGE STEINBERG: So fifty  
4 interrogatories, fifty requests for production and  
5 fifty requests for admissions.

6 MR. RATHER: And what we were trying to  
7 make clear your honor, and I apologize if we didn't  
8 make it clear --

9 ADMIN. JUDGE STEINBERG: No, you didn't.

10 MR. RATHER: -- we did our best. Was that  
11 if you served that set of first interrogatories with  
12 thirty-five and you served a subsequent set, that you  
13 had fifteen remaining.

14 ADMIN. JUDGE STEINBERG: Okay. That I  
15 understood. That basically -- so the total number of  
16 interrogatories anybody can have is fifty. Total  
17 number of requests for production, anybody can have  
18 throughout the course of the case is fifty.

19 MR. RATHER: And as I also understood it,  
20 Entergy would be permitted to serve that, those fifty  
21 interrogatories --

22 ADMIN. JUDGE STEINBERG: On each of the

1 five, yes.

2 MR. RATHER: And likewise, they would be  
3 able to do the same thing, although that did strike me  
4 as little bit repetitive.

5 ADMIN. JUDGE STEINBERG: Well, I am not  
6 going to comment. This is your agreement. And I have  
7 my own, if I was sitting in the room, I might have had  
8 some strong comments. But anyway, does Arkansas Cable  
9 Telecommunications Association have any factual  
10 knowledge independent of Comcast and Buford and is it  
11 WEHCO?

12 MR. THOMAS: WEHCO.

13 ADMIN. JUDGE STEINBERG: God, that was a  
14 good guess. And TCA. Do they have any independent  
15 factual knowledge?

16 MR. THOMAS: By and large no, your honor.

17 ADMIN. JUDGE STEINBERG: Okay. I mean  
18 what -- would you agree that, would you agree that  
19 Arkansas Cable Telecommunications Association can't  
20 file their fifty?

21 MR. THOMAS: What I would prefer to do  
22 your honor, is to allow that flexibility for the

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1 moment to allow them to file separately. But I do not  
2 at this point anticipate that they will be. Can we  
3 leave it that way for now?

4 ADMIN. JUDGE STEINBERG: Okay.

5 MR. RATHER: We don't have any objection  
6 to that. And we might want to depose somebody with  
7 the Association. Right now, I don't know the extent  
8 of their knowledge.

9 ADMIN. JUDGE STEINBERG: Okay. I mean,  
10 I'm -- that's a heck of a lot of, and I'm thinking  
11 about the work that I am going to have to do when I  
12 get the objections and the motions to compel. And  
13 stuff like that. And I mean I'm -- I don't have much  
14 problem with the request for production documents and  
15 requests for admissions. It's the interrogatories  
16 that concern me. And I don't know if fifty is too  
17 much.

18 MR. RATHER: We would be receptive to a  
19 smaller number.

20 ADMIN. JUDGE STEINBERG: Federal rules  
21 usually, I mean they set a limit of twenty-five. And  
22 basically the way I like interrogatories to be used is



1 to just identify individuals with personal knowledge  
2 of certain areas of certain facts. And then you go  
3 and depose the people. Because everyone knows that  
4 interrogatories are not going to be answered by the  
5 people, they are going to be answered by the lawyers.  
6 And at least that's my experience. Anybody have any  
7 problem with reducing the number of interrogatories to  
8 twenty-five?

9 MR. THOMAS: Your honor, I would like to

10 --

11 ADMIN. JUDGE STEINBERG: I mean your  
12 twenty-five is going to -- it winds up to be a  
13 hundred.

14 MR. THOMAS: That's correct, your honor.  
15 Our thought process in coming up with this fifty  
16 number was looking at the very veiled and very complex  
17 Designation Order where if I remember correctly, there  
18 were twenty or so separate issues that were  
19 designated. And that would only leave an average of  
20 2 ½ questions per issue. And it just seemed to us  
21 that if we went too far south of that, that we might  
22 be short changing ourselves.

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1           And I would hope that we would be able to  
2       design our interrogatories in a way that would not be  
3       burdensome. And would be very efficient and would  
4       sweep a number of issues together in an elegant way.  
5       But I just feel with twenty separate issues that fifty  
6       is a reasonable number for each one of these.

7           ADMIN. JUDGE STEINBERG: Okay. Well,  
8       reluctantly since you all agreed to fifty, reluctantly  
9       I'll go along with it. But my, you know, the way I  
10      read the -- I'll have to change the language of the  
11      footnote. The way I read it was, and I was, "Hey, you  
12      know, fifty. Oh, combined. That's great. That's not  
13      unreasonable." But okay. So I'll change the language  
14      of the issue of the footnote to reflect that.

15           The other question I had was in the last,  
16      on the last page of the joint report. Oh, here it is.  
17      You talk about Despositive Motions. What do you mean  
18      by that?

19           MR. THOMAS: Let me take a shot at this  
20      real quickly because I think it points up another  
21      administrative issue which we conferred about briefly  
22      before going on the record and before your honor came

1 into the courtroom. And that is the, that is also the  
2 issue of the date for filing pre-file direct testimony  
3 which we didn't actually put into the joint report  
4 that we offered your honor. And also, I don't believe  
5 is on the draft.

6 ADMIN. JUDGE STEINBERG: Oh, it's in here.

7 MR. THOMAS: It is? The pre-file direct  
8 testimony?

9 ADMIN. JUDGE STEINBERG: No, not pre-file  
10 direct testimony. You exchange your exhibits.

11 MR. THOMAS: Exchange exhibits is.

12 ADMIN. JUDGE STEINBERG: Yes, that's in  
13 here. That's June 15, 07. That was one of your  
14 dates.

15 MR. THOMAS: Yes, no. That's one of our  
16 dates but --

17 ADMIN. JUDGE STEINBERG: What do you mean  
18 by pre-file?

19 MR. THOMAS: Well, written direct  
20 testimony is adequate.

21 ADMIN. JUDGE STEINBERG: That's it.

22 MR. THOMAS: Okay. So that's just -- that

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1 is -- okay. Direct exhibits, okay.

2 ADMIN. JUDGE STEINBERG: Yes.

3 MR. THOMAS: Terminology problem. What we  
4 -- answering your question about the Despositive  
5 Motions, it is conceivable although perhaps not  
6 likely, after the conclusion of Discovery, the  
7 evidence in the parties -- each of the parties minds  
8 may be so overwhelming that there would be an  
9 opportunity to file for what amounts to a Summary  
10 Judgment.

11 ADMIN. JUDGE STEINBERG: Okay. The  
12 commission's rules provide for Motion for Summary to  
13 Judgment. Off the top of my head, I think it's 1.251.  
14 Although it's been eons since I actually had to look  
15 in the rule book since we -- well I'll make no  
16 comment. Yes, I was right, 1.251. It says twenty  
17 days prior to the date set to the commencement of the  
18 hearing. We'll go by the commission's rules.

19 MR. THOMAS: Okay.

20 ADMIN. JUDGE STEINBERG: And let me, let  
21 me just say that the standard is, no material and  
22 substantial question of fact remaining for resolution

1 at the hearing. And it's a very, very high difficult  
2 standard. Because you file a Motion for Summary  
3 Decision and the other party comes in and says, "Well  
4 you have addressed this, this, this and this but there  
5 is still this material interest and substantial  
6 question of fact that requires resolution at a  
7 hearing." You know, the motion is going to be denied  
8 in one sentence.

9 So, and also parties in the past have  
10 tended to use pre-hearing twenty days before the  
11 hearing Motion for Summary Decisions as a tactical  
12 vehicle for tying up the other party's time and  
13 responding to a big thick Motion for Summary Decision  
14 rather than preparing for the hearing. And I frown on  
15 that.

16 So I think if there is no material and  
17 substantial question of fact, then both parties could  
18 agree on it. And you should basically discuss it with  
19 opposing counsel. And see if you can hack it out.  
20 And do some stipulations or whatever. And you could  
21 almost bet that if opposing party, you know, has --  
22 objects and gives you the reason and the reason

1 objectively speaking is a good reason, you know, don't  
2 bother filing. You know, you are just wasting your  
3 time and wasting his time and wasting my time. But do  
4 what you want to do.

5 Why don't we go off the record?

6 You all could look at the dates and look  
7 at the footnotes and see if I screwed anything up or  
8 misinterpreted anything. And then we'll go on the  
9 record, back on the record and we'll just adopt these  
10 dates. And then I've got a couple of other things.  
11 So let's go off the record now, please.

12 (Whereupon the foregoing matter went off  
13 the record at 9:48 a.m. and went back on  
14 the record at 9:52 a.m.)

15 ADMIN. JUDGE STEINBERG: Just back on the  
16 record.

17 For the record has everybody had an  
18 opportunity to look at the dates? And does anybody  
19 have any objection to our adopting the July date  
20 rather than the November date?

21 MR. RATHER: Entergy still would propose  
22 the November 5 hearing date. An orderly approach of

1 deadlines along the lines that you've laid out, your  
2 honor, based on a hearing date of November 5, 2007.  
3 We believe given the amount of discovery that will be  
4 involved and the potential number of depositions that  
5 that is a more realistic date.

6 ADMIN. JUDGE STEINBERG: Okay. Well let's  
7 -- I addressed that earlier and for now, let's stick  
8 with the July date.

9 Does the Bureau have any problem with the  
10 dates?

11 MR. ENGEL: No your honor.

12 MS. SAKS: I just had a question your  
13 honor about the hearing date. Do you anticipate that  
14 we would just continue from day to day until the  
15 hearing is completed? I am wondering if the parties  
16 have any sense of how long they anticipate --

17 ADMIN. JUDGE STEINBERG: Oh, in the joint  
18 reports, they said they estimated about three weeks.

19 MS. SAKS: Okay.

20 ADMIN. JUDGE STEINBERG: Is that right,  
21 two to three weeks?

22 MR. RATHER: That's correct.

1 ADMIN. JUDGE STEINBERG: Wishful thinking.

2 MR. RATHER: And your honor, I might add  
3 that in thinking about that, after Mr. Thomas and I  
4 discussed that length of time, and I believe it is  
5 fair to say, mutually agreed that that was our best  
6 estimate at the time we were talking. Looking again  
7 at the number of issues and considering the fact that  
8 there is an Association and then four separate cable  
9 companies, that may be a little optimistic.

10 ADMIN. JUDGE STEINBERG: Well, it will be  
11 what it will be.

12 My experience is after everybody sits here  
13 for a week and takes, you know, four hours cross-  
14 examining every single witness, you get tired of that.  
15 And then the next week things speed up and then the  
16 next week things speed up. And by the time we are  
17 finished we're all tired and everybody wants to go  
18 home. And that's great.

19 But that's something that we can -- I  
20 can't imagine that we, that this is the last time we  
21 are going to meet before the hearing date. But then  
22 if problems come up we'll address them at the time.



1 Well, I guess I should say it now, I don't  
2 -- when it comes time for cross examination I would  
3 expect that we would not have separate cross  
4 examination by Arkansas Cable Telecommunications  
5 Association and by Comcast and by Buford then by WEHCO  
6 and then by TCA. I presume it will all be done at one  
7 time by one counsel or however the counsel want to  
8 break up the examination. You know, so you don't have  
9 to worry about one of your witnesses being cross  
10 examined five times on behalf of each of the separate  
11 complainants.

12 MR. RATHER: And your honor I would like  
13 that on the record. I have discussed that  
14 specifically --

15 ADMIN. JUDGE STEINBERG: Oh, it's on the  
16 record right now.

17 MR. RATHER: I understand.

18 ADMIN. JUDGE STEINBERG: Yes.

19 MR. RATHER: And that's why I am saying  
20 what I am saying. I have discussed this specifically  
21 with Mr. Thomas who has represented to us that he  
22 represents all of the complainants in this matter.